

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

VERSATA SOFTWARE, INC., ) Civil Docket No.  
ET AL ) 2:07-CV-00153-CE  
 ) May 12, 2011  
VS. ) 2:20 P.M.  
 )  
SAP AMERICA, INC., ET AL )

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE CHAD EVERINGHAM  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

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P R O C E E D I N G S

(Jury out.)

LAW CLERK: All rise.

THE COURT: Please be seated.

I'll hear the Plaintiffs' objections to the charge.

MR. POLLINGER: Your Honor, before we do that, can we lodge our JMOL motions very quickly?

THE COURT: Yes.

MR. POLLINGER: I'll go first on infringement.

Your Honor, the Plaintiffs', Trilogy, Versata, moves for judgment as a matter of law on infringement on modified products from May 6th, 2010 forward, based upon the testimony of Mr. Gupta and the other witnesses and in light of the 2009 infringement verdicts. The change, the 2010 patch does not avoid the 2009 infringement verdict.

Additionally, Mr. Gupta established that all claim elements are met literally. Established that there's direct infringement of all three claims, 26, 28, and 29, as well as indirect infringement of Claim 29 by inducement and contributory infringement.

Each of these were established by a preponderance of the evidence and we submit that we are

1 entitled to judgment as a matter of law.

2 THE COURT: Okay. Motions are denied.

3 MS. FITZGERALD: Versata also moves for a  
4 judgment as a matter of law that it properly complied  
5 with the marking statutes. The -- the -- the fact  
6 testimony in evidence in this case establishes that  
7 Versata carried its burden to show by a preponderance of  
8 the evidence that it properly gave notice to the public  
9 that its claimed inventions were patented by marking its  
10 embodying product with the '350 patent substantially and  
11 continuously between a -- a reasonable time after the  
12 patent issued in April 2003 through the date that  
13 this -- this patent infringement lawsuit was filed.

14 And that Versata also took reasonable  
15 efforts to ensure that its resellers and licensee is  
16 also properly marked any embodying products sold during  
17 the relative time period.

18 THE COURT: That motion is likewise  
19 denied.

20 MS. FITZGERALD: Should I go ahead with  
21 the charge?

22 THE COURT: Yes, please.

23 MS. FITZGERALD: All right. With respect  
24 to the Court's charge, Versata requests a supplemental  
25 Jury instruction on Page 2 of the Court's instruction.

1           We ask that after the sentence that says  
2 Versata seeks damages in the form of lost profits to  
3 compensate it for SAP's infringement, that the following  
4 sentence be added: The previous verdict of infringement  
5 is binding on this trial and our authority for that is  
6 McDaniel versus Anheuser-Busch, 957 F.2d 298; it's a  
7 Fifth Circuit case from 1993.

8           And that states -- states that -- or that  
9 case states: Inherent in the Seventh Amendment  
10 guarantee of a trial by Jury is the general right of a  
11 litigant to have only one Jury pass on a common issue of  
12 facts. Based on --

13           And then also it states that -- or it  
14 holds that it's proper to use rulings in one stage of a  
15 proceeding to dispose of common issues that would  
16 otherwise arise in the later state of the same  
17 proceeding.

18           Based on that same authority, Versata also  
19 requests that on Pages 6 and 7 of the Court's Jury  
20 instruction in the sentence that states: In determining  
21 whether SAP's modified products infringe Versata's  
22 asserted claims, you must determine for each accused  
23 product or its method of use, whether that product or  
24 its method of use contains each and every limitation  
25 recited in a claim, that the following clause be added

1 at the end: Taking the prior infringement verdict as a  
2 given.

3               Next, Versata requests that in the Court's  
4 instructions about marking, the following sentence be  
5 added: However, there is no requirement that Versata  
6 had to begin marking within any given time after the  
7 patent issued and Versata had no duty to mark a product  
8 that included the patented invention until Versata sold  
9 or authorized others to sell the patented invention.

10              Versata asks for that instruction or that  
11 that sentence be added to the marking instruction based  
12 on William Brothers Boiler & Manufacturing Company  
13 versus Gibson-Stewart Company, 312 F.2d 385.

14              And also American Medical Systems, Inc.  
15 versus Medical Engineering Corp., 6 F.3d 1523. Chisum  
16 on Patents, Section 20.03, Section (7)(c).

17              And Wine Railway Appliance Company versus  
18 Enterprise Railway Equipment Company, 297 U.S. 387,  
19 which is noting that the purpose of patent marking is  
20 for the information of the public.

21              Those are the supplemental instructions  
22 that Versata requests.

23              May I approach and hand them up to the  
24 Court?

25              THE COURT: Yes.

1 MS. FITZGERALD: We have two objections to  
2 the charge as it stands. On Page 13 of the charge we  
3 object to the paragraph that states: You have heard  
4 evidence that SAP modified its products in 2010 and that  
5 it did not require prior users to implement the modified  
6 products.

7 Your damages award will compensate Versata  
8 for damage resulting from that infringement and will  
9 license SAP the use of '350 patent for those users.

10 You should not infer that SAP was acquired  
11 to disable the infringing functionality. Because of the  
12 prior determination of infringement, I have allowed you  
13 to consider this evidence because it may be relevant to  
14 the question of demand for patented technology.

15 Versata objects to that paragraph on the  
16 basis that SAP has never pled the defense of patent  
17 exhaustion in this case and so -- and therefore we -- we  
18 submit that this affirmative defense of patent  
19 exhaustion should not be included in the instructions.

20 And finally, in -- and also on Page 13 at  
21 the -- or I guess starting on page -- the bottom of Page  
22 12 and carrying over to the top of 13, there's a  
23 sentence that states: If you find infringement, you may  
24 consider demand for the infringing features of the  
25 accused product to be demand for the patented invention.

1           Versata objects to the inclusion of the --  
2 of the words the infringing features of, in that  
3 sentence, based on DePuy Spine, Inc. versus Medtronic  
4 Sofamor Danke, Inc., 567 F.3d 1314. That's a Federal  
5 Circuit case from 2009.

6           In that case, the Federal Circuit held  
7 that Medtronic asked us to hold that the requisite  
8 demand under the first Panduit factor is demand for the  
9 specific feature; i.e., claim limitation that  
10 distinguishes the patented product from a noninfringing  
11 substitute, not simply demand for the patented product.

12           We decline Medtronic's request.  
13 Medtronic's argument unnecessary conflates --  
14 unnecessarily conflates the first and second Panduit  
15 factors.

16           All that the first factor states and thus  
17 requires is, quote: Demand for the patented product,  
18 end quote. This factor does not require any allocation  
19 of consumer demand among the various limitations recited  
20 in a patent claim. Sorry.

21           And on that basis from that clear Federal  
22 Circuit holding from 2009 in DePuy Spine, we think it's  
23 clear that the first Panduit factor is concerned with  
24 demand for the product, clearly as it states here in --  
25 in DePuy Spine, not for any features of the product.



1 And on that basis we -- we object to the inclusion of  
2 the words for the infringing feature and that sentence  
3 I'm discussing.

4 THE COURT: Okay. I've endorsed the  
5 requested instructions as having been refused. I  
6 overrule the objections to the Jury instruction.

7 Do you have objections to the verdict  
8 form?

9 MS. FITZGERALD: No, Your Honor.

10 THE COURT: Okay. Thank you.

11 MS. FITZGERALD: Thank you.

12 MR. BITTNER: May I approach?

13 THE COURT: Yes.

14 MR. BITTNER: First on the verdict form.  
15 SAP objects to the absence of a marking -- separate  
16 marking instruction and requests that a separate  
17 marking -- marking instruction be provided by the Court.

18 On the Jury instructions, I've handed the  
19 Court three supplemental instructions. The first on  
20 lost profits regarding need for the accused and  
21 embodying products to be sufficiently similar.

22 The second replaces the Court's  
23 noninfringing alternative instruction with that proposed  
24 by SAP in its recent proposed final instructions, Docket  
25 No. 514.

1           The final replaces the Court's marking  
2 instruction with that proposed by SAP in the same  
3 proposed instructions, Docket No. 514.

4           Finally, on Page 13 of the Court's charge,  
5 SAP objects to the final sentence of the lost profit  
6 instruction. Reading, quote: I have allowed you -- you  
7 to consider this evidence because it may be relevant to  
8 the question of demand for the patented technology,  
9 unquote.

10           THE COURT: All right. Any others?

11           MR. BITTNER: That's it.

12           THE COURT: Okay. I've endorsed your  
13 requested instructions as having been refused. I  
14 overrule the objections.

15           I'm also declining the requested -- the  
16 question on the verdict form.

17           What types of warnings do you want for  
18 final argument?

19           MR. COLE: We're going to split it  
20 fifteen, fifteen. I -- just a five minute warning for  
21 me.

22           THE COURT: So you want -- you've got five  
23 minutes after you've used 10 minutes?

24           MR. COLE: Yes, sir.

25           MR. MELSHEIMER: Is it -- is it the

1 Court's practice, Your Honor, to permit such an  
2 impecunious splitting of the time?

3 THE COURT: I'm not sure I want to admit  
4 to that. What are you asking me to do?

5 MR. MELSHEIMER: Split it 15/15.

6 THE COURT: They've got to use at least  
7 half of their time in opening.

8 MR. MELSHEIMER: I -- I just want to make  
9 sure that was -- I thought the Court practice might be  
10 20/10, but that's fine. I just didn't know the Court  
11 practice.

12 THE COURT: No.

13 MR. MELSHEIMER: Do you want to reconsider  
14 it?

15 THE COURT: I don't know, probably not  
16 today.

17 MR. MELSHEIMER: All right. Thank you,  
18 Your Honor. I've offered no compelling reason, I  
19 understand.

20 THE COURT: Or any reason.

21 MR. MELSHEIMER: Well he's going to be  
22 laying in wait, that's why I'm wondering.

23 MR. BAXTER: I've already taken out my  
24 best slide, Your Honor.

25 THE COURT: All the name calling that went

1 on, Mr. Melsheimer, I think he's entitled to it.

2 Ms. Lockhart, if you'll file these.

3 What types of warnings do you want.

4 MR. MELSHEIMER: When I'm not answering a  
5 question, five minutes, Your Honor.

6 THE COURT: Tell you when you've got five  
7 minutes left.

8 MR. MELSHEIMER: Thank you.

9 MR. BAXTER: And Your Honor, if I could  
10 have five and two?

11 THE COURT: You've got five left and two  
12 left?

13 MR. BAXTER: Yes, Your Honor. Thank you.

14 THE COURT: All right. If you'll go ahead  
15 and have them in there in about five minutes.

16 LAW CLERK: All rise.

17 (Recess.)

18 (Jury in.)

19 LAW CLERK: All rise.

20 THE COURT: Please be seated.

21 Ladies and gentlemen, I apologize for the  
22 delay. We have a copier that's programmed to  
23 malfunction whenever we have a rush job, so sometimes it  
24 causes delays. But we're going to hear the final  
25 arguments of counsel, then you'll hear the Court's final

1 instructions.

2 Mr. Cole.

3 MR. COLE: Thank you, Your Honor.

4 THE COURT: You may address the jury.

5 MR. COLE: May it please the Court.

6 THE COURT: Mr. Cole.

7 MR. COLE: You may have heard more than  
8 once during this trial that SAP has already been found  
9 to infringe, so I won't say it again except for that  
10 once.

11 The reason we're here today and the real  
12 dispute here is about the fact that SAP having been  
13 found guilty wants to set the consequences of their own  
14 wrongdoing. They want to pick the price that they  
15 should have to pay and they also want to set the terms  
16 on which their product should be changed to stop  
17 infringing, and they want to make all those decisions  
18 for themselves.

19 But those are the decisions that you will  
20 make here in a few minutes and we're asking you to make  
21 them in a way that's different than what SAP has decided  
22 it prefers for itself.

23 Now, the first question -- you're going to  
24 have five questions, I believe, that you have to answer.  
25 The first three are all about infringement of the

1 redesigned product, the one that they changed in May of  
2 2010. And as we showed you during this trial, that --  
3 that revision, the one that SAP itself decided to make,  
4 doesn't avoid the patent at all.

5 Mr. Diaz, if we could have the SAP note.

6 Now, as we showed you when SAP decided on  
7 its own to make this change to its product after they  
8 were found to infringe, they did some interesting  
9 things. This is the SAP note that made the change and  
10 the crucial thing about this, for our purposes here  
11 today, is that they decided to require only their  
12 brand-new customers to make the changes.

13 If you were an SAP customer who bought  
14 their product at any time from the founding of SAP until  
15 2010, the change was not required for you.

16 And Mr. Mercer said during his examination  
17 that the reason for that is because, well, those are  
18 going to be bought and paid for by virtue of this trial.

19 But think about it this way, SAP's main  
20 reason why that number should be really low is because  
21 they claim nobody uses this feature. Nobody uses this  
22 teeny tiny, itty bitty circle of functionality. Nobody  
23 uses it and so the numbers should be small.

24 But if nobody uses the feature, why do  
25 they go to the trouble of exempting all their existing

1 customers? Why did they go to the trouble to make sure  
2 all their existing customers could continue to use it?  
3 If nobody cared and nobody uses it, why do you carve  
4 everybody out? That makes no sense. That is not common  
5 sense.

6           What that tells you is SAP is well aware  
7 that its customers demand and need and use this feature.  
8 If -- if they really believed what they said in this  
9 trial, they would not have had any reason to do it this  
10 way.

11           And common sense will tell you, too, that  
12 the way this invention works is the -- is the right way  
13 to use it. I mean, their hierarchical access documents  
14 say it's particularly suited for customer and product  
15 hierarchies.

16           Mr. Carter testified and it's just common  
17 sense that pricing is all about somebody, a customer,  
18 buying some thing, a product. That's how it works and  
19 that's the way lots of people use it and our evidence  
20 showed that.

21           Now, the -- the crux of the infringement  
22 case, in other words, does their product still infringe,  
23 we presented through Mr. Gupta our technical expert. He  
24 testified for probably about 30 minutes on his direct  
25 about all the ways in which SAP's new product doesn't

1     avoid the patent.

2                 He testified about the fact they exempted  
3     their customers. He showed you that not only did they  
4     exempt their customers, all the old data, the old access  
5     sequences that anyone set up during the 12-year period  
6     that hierarchical access was sold, everyone, even the  
7     people who took the new change, everyone could continue  
8     to use those just the same way. And as he said, that's  
9     still infringement.

10                They also let their customers use any  
11     off-the-shelf data editing tool to -- to create new data  
12     structures. Everyone can still do that. Their change  
13     didn't stop that.

14                And not only that, their change only  
15     focused on a single customer hierarchy, very specific  
16     one called the KNVH. That's the only one that they  
17     disabled.

18                But the evidence was very clear that there  
19     are lots and lots of ways to organize a customer  
20     hierarchy and the obvious one is the geography, which  
21     everybody talked about. Customers in Texas, customers  
22     in Marshall, that geography -- geographical hierarchy is  
23     a hierarchy of customers and it's still in their  
24     product.

25                And so as a result, questions one,



1 Mr. Diaz if we can get that, we filled these out for  
2 you. These are the ways we believe the evidence shows  
3 you should answer.

4 Question one is about infringement; in  
5 other words, does the new product continue to infringe.  
6 There are three patent claims and we believe the answer  
7 for all three is yes.

8 Okay. Question two, there are different  
9 kinds of infringement, there's direct infringement and  
10 question two is about induced infringement. And Mr.  
11 Gupta testified SAP also induced infringement and the  
12 answer to that question is yes.

13 And then question three is -- is also  
14 another kind of infringement called contributory or  
15 contributed to infringement, and we believe the answer  
16 to that is yes. The infringement issues were all  
17 handled together, but they're broken out into three  
18 legal categories in the charge.

19 So questions one to three we believe the  
20 answer is yes.

21 Now, I'll talk about damages which will be  
22 the last question on your chart. And most of the focus  
23 on the case was about damages.

24 And Mr. Diaz, if we could have the lost  
25 sales chart.

1                   This was my chart, the graphics guys  
2                   called this coal mountain. I can't tell if they're  
3                   making fun of me, but we used this a lot, particularly  
4                   me, so I figured better use it now.

5                   Now, what -- I added a few things here to  
6                   make a couple of timeline issues clear that I think were  
7                   confusing during the trial. And just so the -- just so  
8                   we're clear, the record -- the record is clear,  
9                   Mr. Carter made his invention, he came up with this idea  
10                  in 1995. He filed for his patent in 1996. And the  
11                  evidence is crystal clear that that's the priority date  
12                  he is entitled to for his invention. That's when he  
13                  stuck his flag in the ground and the law gives him the  
14                  right to that priority date.

15                 Now, the patent, as you can tell, was in  
16                 the Patent Office for a long time and didn't issue until  
17                 here. And the evidence is also crystal clear that we  
18                 are not claiming any damages whatsoever for this period  
19                 of time, not one dime. All of our damages start in  
20                 2003.

21                 So the question then is: What is the  
22                 evidence on damages? And our position as we -- as we  
23                 showed you during trial is that Trilogy lost sales as a  
24                 result of SAP's infringement and we think the best  
25                 evidence is right here on this chart.

1                   What happened in the real world when  
2                   Trilogy stopped being an exclusive provider of this  
3                   technology and SAP, the third largest software company  
4                   in the world, bundled it into their core products, and  
5                   you can see the obvious difference.

6                   And as the evidence showed you, it is  
7                   difficult for Trilogy to compete selling their product  
8                   when SAP has bundled it in for free and is selling it to  
9                   all the same customers. There is no way you can compete  
10                  against that and you can see the results.

11                  But as the evidence was also clear, what  
12                  you have to decide in lost profits is what would have  
13                  happened if SAP hadn't infringed? You have to create a  
14                  but-for world, a world that didn't exist in the real  
15                  world because SAP did infringe and from 2003 forward  
16                  they've infringed all along.

17                  So when you look at the real world  
18                  evidence, you have to step back, given the job here, and  
19                  say okay what would the world look like if SAP hadn't  
20                  been infringing?

21                  What sales might Trilogy have been able to  
22                  make if SAP could no longer offer this feature to its  
23                  customers?

24                  And we think the best evidence of that is  
25                  what happened in the real world when Trilogy had an

1 exclusive, when Trilogy was the only one with the --  
2 selling this patented product.

3 The patent gives you exactly that right.  
4 And so in 2003 when the patent issued, that's what  
5 Trilogy gets. They get an exclusive again.

6 They get to get in 2003 what they once had  
7 back here before SAP started infringing. And  
8 Mr. Weinstein was very clear that his lost profits  
9 calculations, his view of the world was based entirely  
10 on Trilogy's actual history.

11 And what he did was he said, well, in 2003  
12 I think Trilogy would have been able to do the same  
13 thing they actually did in the real world when they had  
14 that exclusive right.

15 Now, I think you're going to hear a number  
16 of things from Mr. Melsheimer in a minute. I think one  
17 thing you're going to hear, which we heard a lot, was  
18 that all of the competition from SAP even here, even  
19 starting with hierarchical access, all of that  
20 competition was legitimate competition, legitimate  
21 competition, and that the infringement didn't start  
22 until here and so none of this matters in some sense  
23 because it's legitimate competition.

24 I think you'll hear something like that.  
25 A couple points about that.

1           First of all, we're not claiming any  
2 damages for that period of time. And second of all, the  
3 fact that the patent hadn't issued and SAP could  
4 therefore not offer this product without infringing  
5 doesn't change the infringement there.

6           And third of all, the question of what's  
7 legitimate competition is -- it's not going to be on  
8 your chart and not only that, there's a lot of different  
9 ways to think about that question.

10           Is it legitimate competition for SAP to  
11 meet with Mr. Carter in a trade show, sit down, ask him  
12 questions about his product, take notes about it, learn  
13 about how it works under the pretense of doing a  
14 partnership deal, which Mr. Carter wanted to do with  
15 SAP.

16           THE COURT: You've used 10 minutes.

17           MR. COLE: Thank you, Your Honor.

18           While at the same time, having already  
19 decided months earlier before they sat down with  
20 Mr. Carter having already decided that they weren't  
21 going to do a deal with Trilogy, they just weren't going  
22 to tell them yet. Is that legitimate competition?

23           Is it legitimate competition for SAP  
24 engineers to study Trilogy's product and make theirs  
25 work just like it and then promise its customers in

1 advance that it's going to introduce features just like  
2 Trilogy's? Is that legitimate competition?

3 Not only does that address the question of  
4 legitimate competition, but it also shows you how  
5 important this invention was. Because back here when  
6 this was an exclusive, you saw all the internal e-mails  
7 from SAP about how concerning it was to them, how  
8 Trilogy was beating them in the marketplace. And that  
9 shows you what this is worth when it's in -- on an  
10 exclusive basis.

11 And so Mr. Diaz, if we could go to  
12 question four.

13 And so question four is the lost profits  
14 question. They have two separate questions because  
15 Mr. Weinstein and Mr. Wagner had two separate approaches  
16 to damages.

17 Question four, this is Mr. Weinstein's  
18 lost profits, and as he testified in his opinion, the  
19 amount of lost profits suffered here is \$285 million.  
20 That's 93 customers over an eight-year period of time  
21 which matches the historical record.

22 And as you also heard Trilogy in the real  
23 world sold Pricer to 45 of the same kinds of customers  
24 Mr. Weinstein is pointing to during a four -- three or  
25 four year window. 45 of these big companies bought

1 Pricer in the real world in four or five years and  
2 Mr. Weinstein says 93 more would have bought it during a  
3 longer period of time of eight years. We think that is  
4 well supported by the evidence.

5           The last question, question five, this is  
6 the second damages question, this is Mr. -- excuse me,  
7 Mr. Wagner's reasonable royalty, that's the different  
8 approach. And Mr. Wagner, as you know, said that that  
9 number is \$2 million. That was his analysis and his  
10 opinion.

11           But on cross-examination, we saw that what  
12 he did actually is he went out and he looked at some  
13 benchmarks that were sold to 12 customers, 12 customers  
14 total, and he used that to come up with a -- with a flat  
15 fee kind of royalty, \$2 million.

16           But if you applied his methodology at/to  
17 all of the actual infringing sales, the number goes from  
18 2 to 170 million and we think that is a more appropriate  
19 number, but we leave that to your discretion.

20           That -- these are the questions that you  
21 have to -- to deal with, and we leave the decision  
22 ultimately to you to evaluate Mr. Wagner's approach that  
23 he offered and the one that we showed on  
24 cross-examination.

25           Thank you, Your Honor.

1 THE COURT: Mr. Cole.

2 MR. MELSHEIMER: May I have a moment, Your  
3 Honor?

4 THE COURT: Yes, sir.

5 MR. MELSHEIMER: May it please the Court,  
6 Your Honor.

7 THE COURT: Mr. Melsheimer.

8 MR. MELSHEIMER: Ladies and gentlemen,  
9 thank you so much for your time. I know how attentive  
10 you've been and I really appreciate that.

11 You may recall about 10 days ago at the  
12 beginning of the case at Jury selection, I told you I  
13 was concerned and I was concerned that we would start  
14 the case in a hole because the infringement issues had  
15 already been decided. And I tried to talk to each of  
16 you about that issue because I thought it was so  
17 important.

18 You may recall that a couple folks way  
19 back in Jury selection gave answers that suggested maybe  
20 they -- they had prejudged the case or couldn't be fair  
21 because of that. Those folks didn't make it into the  
22 Jury. They didn't make it into your seats.

23 You're in your seats because you took an  
24 oath to be fair to both sides and to not put anyone in a  
25 hole. And it's from the way you've paid attention, it's



1 quite clear to me that you've done just that and I'm  
2 very grateful.

3 In the opening, I told you three important  
4 facts that I thought would never be disputed in this  
5 case and it turns out that I don't think they have been.

6 Fact number one, you didn't hear a single  
7 customer testify that they decided not to buy Versata's  
8 Pricer product because SAP had this hierarchy access  
9 pricing feature, and that's the key issue in the case.  
10 That's the causation issue that the Judge will instruct  
11 you about in the Jury instructions.

12 Fact number two, back in 1998, when SAP  
13 added this pricing feature, there was no infringement of  
14 any patent. So they kept talking about the patented  
15 product or the patented invention back in the '90s.  
16 It's a smoke screen. There is no patented invention in  
17 the '90s.

18 The patented invention only existed  
19 starting in 2003. And finally for the period of time  
20 that infringement was determined, it was not determined  
21 that it was deliberate or intentional. It was found  
22 that it was not willful.

23 So the fact is, we don't dispute the  
24 determination, but don't make them -- don't let them  
25 make it sound worse than it was because there was no

1 determination that it was deliberate or intentional.

2           Why are these facts so important? Well,  
3 because I told you from day one that the evidence would  
4 show that SAP's actions did not cause this company to  
5 lose business, and that makes sense. Because remember  
6 the feature here, it's a three-way component. This  
7 three-way component of determining a price using a  
8 product group, a customer group, and hierarchy access is  
9 not something that SAP customers use. It's not  
10 something they cite as a reason for buying the software,  
11 and because of that, it can't be a reason for Versata or  
12 Trilogy to have lost any business.

13           I'm going to go over some evidence with  
14 you and I'm going to look at some documents that you've  
15 seen several times.

16           Let me suggest to you that your role is a  
17 little bit like a detective. Now, if this were a TV  
18 show, it'd probably get canceled for being boring, but  
19 it is a little bit like a detective because you have  
20 some detective work to do in the Jury room.

21           The investigation you're conducting is  
22 what killed Trilogy's Pricer business. Was the wound  
23 self-inflicted? Was it the result of changes in the  
24 marketplace for which no one can be held responsible?  
25 Or was it, as they claim, SAP's fault?

1                   Now, like any good detective, let me  
2 suggest that you start at the beginning, which was way  
3 back in the 1990s when Trilogy first introduced the  
4 Pricer product.

5                   Can we have the screen back?

6                   COURTROOM DEPUTY: Yes, sir.

7                   MR. MELSHEIMER: What do we know about  
8 that time? Well, we know that some companies liked the  
9 product. No doubt about it. Some early adopters that  
10 we heard about bought the product.

11                   But like many early companies and early  
12 products, that success did not continue.

13                   What did we see in the evidence? Well, we  
14 saw this, from 1998, Trilogy itself, this is DX910 if  
15 you're -- if you're -- if you're taking notes, DX910.  
16 In 1998 Trilogy projected that Pricer would decline as a  
17 percentage of revenue by product. Way back in 1998 they  
18 predicted that the decline would -- would occur.

19                   Now, were these projections the fault of  
20 SAP? Now, this actually happened, they did have a  
21 decline. This is a decline as a percentage of revenue  
22 but they had a decline throughout their efforts.

23                   Now, they had success with early adopters,  
24 but what did they tell us in Exhibit 514? They weren't  
25 able to move Pricer past the early adopters into the

1 mainstream. They couldn't reach the mainstream.

2           What happened? Well, they weren't able to  
3 sell the product very successfully.

4           DX514, again, February 1998, the SC Pricer  
5 team has met with over 40 SAP and Oracle companies. So  
6 remember they weren't just trying to sell to SAP.  
7 Oracle, too, only one of those companies have  
8 subsequently purchased the software.

9           A few months later we see more or actually  
10 in the same month we see more. Some bad assumptions  
11 they made. The Pricer team inaccurately assumed that  
12 the majority of SAP customers needed enhanced pricing  
13 execution capabilities; the market has indicated  
14 otherwise.

15           A couple months later we see this, we see  
16 that they conclude that they had bet big on Pricer and  
17 it failed to deliver for this period of time, but they  
18 concluded that it was a poor value proposition into the  
19 SAP accounts. Too maintenance, not technical -- not  
20 enough business benefits.

21           These are all their conclusions before  
22 they get the patent, before this lawsuit is filed.

23           But let's go back to their other  
24 documents. They knew their software had problems. This  
25 is Defendants' Exhibit 830. This is what they said at

1 the end of 1998, after they've had some success after  
2 they've made some sales. We spent all -- they spent all  
3 manner of stories to sell our code, talking about the  
4 salespeople.

5 When someone attempts to deploy the code,  
6 it's a nightmare. The process is scary for the short  
7 term, but it will not scale for the long-term.

8 What did they hear from Mr. Thompson at  
9 the end of 1998? Mr. Thompson says this software is  
10 bad. Ask any integrator. Ask any user. Ask any  
11 customer.

12 Now, you're going to hear from them when I  
13 sit down that you're insulting us, that your bringing up  
14 irrelevant issues. This is not me saying this. This is  
15 Trilogy's own developers saying that their software  
16 doesn't work. It's bad. You can ask people and they  
17 would tell you about it.

18 Now, does that suggest to you that there  
19 was something else going on at Trilogy other than what  
20 SAP was doing? But whatever was going on in 1998, it  
21 wasn't patent infringement. And it's never been  
22 determined to be unfair competition or anything else  
23 that counsel just suggested to you.

24 It wasn't just Mr. Thompson that thought  
25 the software was bad. The -- the CEO of the company

1 Mr. Liemandt said, you know, there's about 50 people at  
2 Trilogy that have the same view.

3 Now, we don't have to go through all of  
4 these, but if you look at this time period when their  
5 sales went up and down, you can see the problems people  
6 were identifying.

7 What I've done is I've taken what Mr. Cole  
8 called coal mountain. See that's the problem it is coal  
9 mountain. For them to be able to convince you that they  
10 have a winning case, it needs to be SAP mountain and  
11 it's not.

12 Because they are having all these issues  
13 and what I've interlineated here is all these different  
14 facts, accounts lost, the software is bad, the Pricer is  
15 a nightmare. All these facts, you put them along these  
16 lines and you get a very different picture.

17 And in fact you go down to here in 2000  
18 and you get 57 percent of their clients are  
19 dissatisfied. You've got this TOPS exercise, remember  
20 that was their self-criticism. They brag about doing  
21 that, which is great, but they don't want to accept the  
22 consequences for it. They don't want to accept  
23 responsible for what they found. They revealed the deep  
24 problems.

25 And in 2000 at least some of the Trilogy

1 people concluded that Pricer does not drive sales, that  
2 that -- that program does not drive sales and that it  
3 may be dead.

4                   That's all reflected in this customer  
5 survey. The facts don't lie. When you're having  
6 problems, when your software is bad, when you're having  
7 problems selling it in the marketplace, when you call on  
8 40 customers and you only sell one and then the  
9 customers you do sell to, you've got people saying the  
10 software is a nightmare to install, you have 57 percent  
11 of your pop up -- 57 percent of the respondents in this  
12 survey saying, you know, our expectations have not been  
13 met.

14                   Now, in bringing all this evidence to you,  
15 I hope you don't think I was trying to unfairly  
16 criticize Trilogy in any way. I wasn't.

17                   Keep in mind, the Court only allows  
18 admission of evidence that's relevant. It only allows  
19 relevant arguments, and the relevance of this evidence  
20 is clear. You'll see it in the charge.

21                   The Judge will tell you you need to look  
22 at what caused Trilogy to lose sales. If it wasn't  
23 SAP's infringement, if it was something else, they can't  
24 get damages for those lost sales. It's just that  
25 simple.

1                   And again, you don't have to just listen  
2 to my argument. Their own witnesses told you this. You  
3 heard from Mr. Smith.

4                   I asked him, you understand that Trilogy  
5 is not entitled to lost profits if the reason for the  
6 decline in business is related to, for example, their  
7 own internal problem, fair. That would be fair.

8                   Mr. Weinstein, their expert, says the same  
9 thing. He says, if -- the dropoff of sales, the issues  
10 with Pricer, the technology issues, the changes in the  
11 marketplace, all that happened before 2003. All that  
12 can't be the basis for any damages in this case, you  
13 know that, right? Correct. And of course that's right.

14                  These other problems -- so things got so  
15 bad with Trilogy that in 1999 -- again, this is not a  
16 criticism, this is the facts. This is what was  
17 happening. In 1999 Mr. Carter told us that they just  
18 gave up.

19                  I want to make this clear. Your testimony  
20 is that you stopped making efforts to try to sell Pricer  
21 to SAP customers in the '98 or 99 time frame, right?  
22 Yeah, in that rough time frame. And just so we're  
23 clear, that's thousands and thousands of potential  
24 customers, fair?

25                  Now, think about what they're doing. They



1 stopped, they quit in 1998 and 1999. And now they're  
2 trying to say that the reason why they lost sales  
3 starting in 2003 was because of something we did, that  
4 doesn't make any sense.

5 Now, they talk about infringement. They  
6 want to talk about that over and over again. I did a  
7 word search last night. This is roughly accurate. I  
8 didn't do one today. They had -- their lawyers had used  
9 the word infringement during this trial 169 times. They  
10 said the word reasonable one time.

11 They want you to focus on infringement  
12 because they want to distract you from the issues in  
13 this case, which is they stopped selling this product  
14 and therefore they're not entitled to lost profits.

15 Now, you've heard of several reasons why  
16 that might happen. Well, let's talk about this -- this  
17 Gartner study.

18 You've heard some descriptions of the  
19 marketplace, and this was this 2002 Gartner study and,  
20 again, this is as of February 2002. This is in  
21 evidence. And it had Trilogy right there in the middle  
22 of all this competition.

23 And again, it's competition in product and  
24 pricing and pricing configuration, all these different  
25 categories.

1           But just a year later, a year later in  
2 February -- in February 2003, they're out of the  
3 marketplace. They're nowhere to be found and that makes  
4 sense, doesn't it, because Mr. Carter said, well, they  
5 quit several years earlier trying to sell to SAP  
6 customers. And then apparently between 2002 and 2003  
7 they quit selling to everybody. They quit selling to  
8 everybody.

9           Now, there are several reasons why that  
10 happened. Again, doing your detective work, why did  
11 that happen? Why did they disappear from the market?

12           Well, one is those internal issues at  
13 Trilogy that we talked about. The failure to properly  
14 integrate the software technically.

15           Now, they said, well, you should have  
16 helped us. You should have given us all the software  
17 code to make our code work, but the witnesses said, no,  
18 that's not what's done in this business. That's not  
19 what's done in the industry. There was no legal  
20 requirement to do that and there's nothing wrong with  
21 someone saying, you know what, I'm going to let you  
22 score your own touchdown, I'm not going to give you the  
23 play. There's nothing wrong with that.

24           The failure to learn about how SAP  
25 software worked, you saw that over and over again.

1 Mr. Carter took personal responsibility for that and I  
2 admire him for it because I think he's one of the few  
3 people that has taken responsibility.

4 He says we screwed up. We screwed up  
5 because we just don't know enough about SAP software,  
6 not because they won't tell us, not because they're  
7 being unfair to us, not because they're holding back,  
8 but because we haven't done the work. That's what he  
9 said, and that -- that's what those documents say.

10 Trilogy also had problems selling the  
11 product in this time period at the prices they were  
12 charging. Some people said, you know what, we need to  
13 lower our price. If we sold it at a hundred thousand  
14 dollars instead of 1.8 million, we'd probably get a lot  
15 of sales. Some people thought that \$50,000 would be a  
16 better price.

17 And you saw this document as well,  
18 Defendants' Exhibit 811. The previous exhibit is 514.  
19 This one is 811.

20 Not compelling at 1 million, though it was  
21 at 50K. You're charging too much, another reason why  
22 the mountain collapsed on them.

23 The other cause of the decline of Pricer  
24 has nothing to do with Trilogy at all and we can't blame  
25 them for this and no one has. There was a lot of

1 competition in the marketplace. You heard this from  
2 Mr. Gupta.

3 Pricer was competing against the installed  
4 system of customers who were already doing pricing?  
5 Yes. It was competing against SAP? Yes. It was  
6 competing against Oracle pricing? Yes. It was  
7 competing against the pricing solution of at least a  
8 couple of other companies? Correct.

9 When you look at the entire market, yes.  
10 They're competing and they're not winning. And that's  
11 disappointing, but that's not the basis for coming into  
12 court and saying pay me \$285 million.

13 And even their own expert said it. There  
14 are many, many other companies other than SAP in this  
15 marketplace.

16 Now, let's look back at that Gartner study  
17 for just a minute. Do you remember all the competitors  
18 that Trilogy had in 2002 all those little dots? Now,  
19 you heard the Plaintiff suggest, well, maybe some of  
20 those companies didn't offer all the functionality that  
21 Pricer did. But you never heard about Oracle. You  
22 never heard anyone say, well, Oracle doesn't offer that  
23 functionality, which is one of the largest ERP companies  
24 in the world.

25 You heard about Siebel. Remember

1 Mr. Tully told you that Siebel was out there selling  
2 pricing capability.

3 In fact, remember, Trilogy was so  
4 concerned about Siebel that in March of 1998 that they  
5 developed a marketing message that this is going to be a  
6 frontal comparison oriented campaign. Like the old  
7 Oracle campaigns, hard hitting, aggressive, willing to  
8 go over the line.

9 Again, I'm not criticizing them for being  
10 aggressive. They're competing. This is back in March  
11 of 1998. But the fact is they're admitting to you in  
12 their own documents in the relevant time period here  
13 that, hey, there's a lot of people out there. There's a  
14 lot of other reasons why we're not making sales.  
15 There's a lot of other companies that we have to compete  
16 against.

17 You don't worry about a company and plan  
18 to attack them and go over the line in a hard hitting  
19 aggressive way unless you view them as a competitor.

20 But let's put all this aside, because one  
21 of the great things about this case is whenever there's  
22 a dispute, you can actually resolve it by looking at  
23 either Trilogy's own documents, prepared long before the  
24 lawsuit was filed, or listening to the testimony of  
25 their own witnesses.

1                   Because what was Trilogy's own conclusion?  
2   Their own conclusion, this is the document you saw with  
3   Mr. Wagner. Remember, this was a 2 -- February 2004,  
4   DX1069, if you're taking notes. Look at all the  
5   competitors in the pricing space. Pricing execution.  
6   Look at them all. And some of them are high  
7   competition. I submit to you most of them are. Most of  
8   that chart in that column is red. Very, very high  
9   competition and some of the same companies that  
10   Dr. Becker pointed out.

11                   So Trilogy is saying this, not Dr. Becker,  
12   not Gartner, but Trilogy is saying this way back in  
13   2004. But let's not overlook something. It's not just  
14   the mistakes that are causing the problems. It's not  
15   just the increased competition. It's not just the  
16   changes in technology, we heard all about that.

17                   In 2004 they don't have a -- Trilogy  
18   doesn't have a patent earlier than this. They get their  
19   patent in 2003. Now, they have it in 2004, but they  
20   don't have it in '98, '99, 2000, and 2001.

21                   Remember this timeline that I did. I know  
22   it's probably the ugliest exhibit in the case, but it's  
23   3182. But remember this timeline we did with -- with  
24   Mr. Carter? This is all the decline that they show  
25   happening and most of it is between 1998 and 2003. And

1 when you look at that, you've got no infringement.  
2 You've got no patent during that time frame.

3 So whatever is happening with Trilogy at  
4 that time, it can't be the result of something we've  
5 done.

6 Now, I will suggest to you that Trilogy  
7 has tried to confuse this issue almost every day of the  
8 trial. And I've had to fix it with almost every  
9 witness.

10 They talked about the filings in the  
11 Patent Office. They talked about the dates of different  
12 patents that are not even involved in this case. Well,  
13 all the stuff was on file in 1996. It doesn't matter.

14 You've got that patent in your binder.  
15 That patent did not issue until April of 2003. And  
16 Mr. Carter told you, Mr. Carter told you they left the  
17 market for selling Pricer several years earlier, and  
18 they had not made a new sale to a new customer of Pricer  
19 since about 2001. Now, that is telling evidence that  
20 anything we did after 2003 was not the cause of their  
21 problems.

22 Now, those Patent Office filings, remember  
23 they're secret, no one -- we didn't know about them, I  
24 don't know if there's been some suggestion that we went  
25 up to Washington and looked in these files. That's not

1 the way it works.

2                   Number one, they're secret.

3                   Number two, you've heard no evidence of  
4 that.

5                   But we do know number three, they never  
6 told us about the patents, they didn't have to.

7                   I'm not fussing at them for not disclosing  
8 those patents to us, but the fact is they didn't. And  
9 we didn't know about it until 2007 when they filed this  
10 lawsuit.

11                   What is their response to what I think is  
12 overwhelming evidence from their own files and their own  
13 witnesses?

14                   Well, they say, look, you froze us out.  
15 You froze the marketplace by announcing the hierarchical  
16 access feature before it was ready.

17                   What is your detective work going to tell  
18 you about that? Well, first off all, preannouncement,  
19 preannouncement is something a lot of companies do. We  
20 saw Trilogy does it. They announce things before  
21 they're actually ready to go. Nothing wrong with that.  
22 Two, it doesn't matter. They had no patent in 1998.  
23 And there was nothing that stopped SAP or any other  
24 company in the world from adding this specific pricing  
25 functionality to their products.



1           And that's why when you look at damages in  
2 the case, you have to look at 2003 starting with the  
3 facts leading up to 2003 and the facts beyond 2003.

4           Trilogy's lost profit damages require it  
5 to prove lost sales, and you'll see this in the charge,  
6 the Judge's instructions.

7           Without lost sales caused by SAP in 2003  
8 or beyond, they can't recover. Now, if they presented a  
9 reasonable royalty theory to you, like you typically get  
10 in an oil and gas case or something like that or might  
11 think of a -- of a -- of a recording artist who gets a  
12 royalty on each of the records that he sells, if they'd  
13 done that, they wouldn't have to prove anything in lost  
14 sales. They would just be entitled to a royalty for the  
15 value of the invention.

16           You saw from Mr. Wagner the right way to  
17 do that, how to properly perform it. You know, I don't  
18 think they liked the numbers. I don't think they liked  
19 Mr. -- the numbers Mr. Wagner came up with, so instead  
20 they presented a different theory, this lost profits  
21 theory that allow them to put out a large number -- let  
22 me tell you something else I'm worried about. They're  
23 going to put out a large number hoping that, well, if  
24 you cut it in half, we're okay with that, but they still  
25 have an enormous recovery that is not consistent with

1 the facts in the evidence, that's important.

2 Now, let's look at what they do in their  
3 lost profits analysis. You remember the factors,  
4 demand, demand is a factor. What does their expert have  
5 to say about that?

6 The demand for this feature is not the  
7 basis for demand for SAP's products, right? That's  
8 true, I agree with that. Then the other factor, you  
9 didn't analyze the existence of noninfringing  
10 alternatives. This is an important point because if  
11 customers could go elsewhere, if customers could go  
12 elsewhere other than price -- other than Trilogy or  
13 other than SAP, then Trilogy can't claim they would have  
14 gotten those sales.

15 A lot of this sounds like complex  
16 economics, but it's really common sense. If you can't  
17 go to one place to get something, does that mean you're  
18 going to go to the other -- to one other place if  
19 there's actually 10 or 15 options? And that's just  
20 why -- that's why this is sort important, but Mr. --  
21 Mr. Weinstein didn't do his homework. He didn't do his  
22 homework.

23 I assumed, that's a great word, that's a  
24 great word to base \$285 million on. I assumed there  
25 were no acceptable noninfringing alternatives.

1                   And lastly let's look at how he figured  
2 out the lost profits. He looked at only their top 10  
3 customers, their 10 best customers, and he did that not  
4 because it was sound economics, not because it was  
5 rational under the law, not because it squared with his  
6 common sense. He did it because Mr. Smith told him to.

7                   So what is the right approach? The right  
8 approach is a reasonable royalty, which is what the law  
9 says.

10                  You heard the testimony of Mr. Wagner, it  
11 was unrebutted. They didn't put on a witness to rebut  
12 him. He went through loads and loads of information,  
13 went through all the factors that go into this analysis,  
14 showed you how the feature was just a tiny part of SAP's  
15 software. Showed that it turned out to not be very  
16 important, that it didn't drive sales, you heard that  
17 from Mr. Childs and Mr. Tully. None of these customers  
18 ever mentioned this feature. It's a very small feature.

19                  Now, that's not to criticize the feature,  
20 but in a program that has hundreds of thousands of  
21 features and there's one small feature and you're going  
22 to hang \$285 million on that, that does not make common  
23 sense. He concluded that a fair royalty was \$2 million.

24                  And I submit to you if before you came in  
25 here you heard about a product that no one was ever

1 shown to actually use, only the capability that was  
2 never shown to drive a sale or close a deal, and that a  
3 company had abandoned from selling starting in about  
4 1999, they'd just given up selling it, you'd think \$2  
5 million was a great deal, was a great deal under those  
6 facts. And it is a great deal for them and it is a  
7 reasonable deal.

8           Now, let me talk about a couple of other  
9 things. I'm -- I'm running out of time, but let me say  
10 something about what I think has been a real smokescreen  
11 in the last couple of days.

12           They say, well, you haven't taken it out.  
13 You haven't taken this out and people are still using  
14 it.

15           Number one, there's no evidence that  
16 anyone's ever used it. You saw that survey, what was  
17 bogus about that survey, got to get that three part  
18 component. They never asked the right question. But  
19 the Judge is going to tell you something to straighten  
20 this out. The software that's already sold is exactly  
21 what we are here to pay a reasonable royalty on. And  
22 the Judge will tell you in his instructions about  
23 pre-existing customers, that there's no obligation for  
24 us to go rip that out because this is what you guys are  
25 here to decide, what is reasonable for that capability,

1 that small capability in our software.

2 THE COURT: You've got five minutes  
3 remaining.

4 MR. MELSHEIMER: Now, what about the  
5 changes that we made? You heard from Dr. Mercer that --  
6 first of all, that it's technically always been an  
7 option but that once people get the upgrade, once people  
8 get the new maintenance, the feature is totaled  
9 disabled.

10 So if you want any new SAP, if you're a  
11 new customer, or if you want an upgrade -- and who  
12 doesn't want an upgrade, if you're an existing  
13 customer -- the functionality just disappears. It's out  
14 there.

15 Now, how is it disabled? Well, he told  
16 you that. They took out one way of doing the  
17 combination of hierarchical access with customer  
18 hierarchy. It's not allowed. And remember what -- what  
19 you heard from the experts. If you just don't do one  
20 part of this, you're not infringing. You're not  
21 infringing the patent.

22 So everyone will have the upgraded version  
23 of SAP when they upgrade, and no one will be able to do  
24 this. Does that prove that people are using it? Does  
25 that prove that we thought it was important? It proves

1 nothing of the kind.

2 Now, let's talk about something else  
3 regarding this infringement work, and it's a little bit  
4 of a detective issue, too.

5 Is it fair to consider the credibility of  
6 the witnesses? If you're going to come in and ask for  
7 nearly \$300 million -- by the way, now it's over that.  
8 I don't know if you noticed that. It's over 300. Now  
9 they're asking for \$500 million.

10 In bringing you that claim, you would  
11 expect them -- you would expect them to bring an  
12 independent expert witness. They did bring two,  
13 Bakewell and Weinstein, but on the issue of the  
14 technology, what did they do? They brought you  
15 Mr. Gupta.

16 Now, I'm not fussing at Mr. Gupta, but did  
17 they look around for an independent engineering expert  
18 who's highly regarded in his field? Did they look in a  
19 college or university? Did they go out in industry and  
20 find an expert?

21 They brought you someone who's worked at  
22 their company for 14 years. He's close friends with all  
23 the other witnesses. He was involved in the oversight  
24 of this very lawsuit for a couple of years. Does that  
25 sound like someone who's independent?

1                   How do they fix that? They fix that by  
2 saying: Mr. Gupta, are you biased? Well, that's the  
3 problem with bias. It's insidious. You're not aware of  
4 it. And it can affect things that you do.

5                   It's not that I think he's saying things  
6 that he believes are untrue. I don't think that at all.  
7 He may well believe them. But it's his view of the  
8 truth is shaded by his prior relationships, his prior  
9 positions, and his prior responsibilities.

10                  What's the first thing we ask in jury  
11 selection? Where do you work? It's important.  
12 Because, you know, it might be -- Trilogy might want to  
13 know that if you work at SAP, maybe you wouldn't be a  
14 fair juror for them, and I agree.

15                  But Mr. Gupta, again, was he unbiased? I  
16 think he was biased, and I think you can reach that  
17 conclusion.

18                  Now, compare him to Dr. Mercer. We know  
19 one thing about Dr. Mercer. He was loud. We know a lot  
20 of other things about him, too, though. He's a  
21 distinguished professor. He's got a Ph.D. He's worked  
22 at Bell Labs. He's worked at two of the most  
23 prestigious universities in the state.

24                  So you're going to have to judge the  
25 credibility on a very complex technology issue, and

1 you're going to have to decide. I suggest to you that  
2 it's Mr. -- it's Dr. Mercer that's more credible. And  
3 Dr. Mercer explained to you how the feature was disabled  
4 and how there's no future infringement.

5 Now, as to the questions in the charge,  
6 I'm going to tell you to answer those no and to answer  
7 the reasonable royalty of \$2 million. And that's what  
8 you should consider. They shouldn't get lost profits,  
9 and they should get a reasonable royalty of \$2 million.

10 But let me suggest to you that there's  
11 some other questions you might want to ask yourself that  
12 aren't on the charge. And I'm going to finish very  
13 quickly.

14 If Pricer was so good, how come nobody  
15 bought it after 2001, even if -- even companies that  
16 weren't using SAP?

17 If Pricer was so promising, why did  
18 Trilogy's own projection show it as a decreasing  
19 percentage of revenue beginning in 1997?

20 Why didn't a single SAP customer cite  
21 hierarchy access as a reason to buy SAP software? If  
22 SAP's hierarchy access was the cause of Pricer's  
23 decline, how come Trilogy never even heard of it?  
24 Remember that? They hadn't even heard of it before  
25 2007. It's killing your business, and you've never even



1 heard of it?

2 (5) If SAP took or copied anything  
3 belonging to Trilogy, why was the infringement not  
4 determined to be deliberate? Because we didn't take  
5 anything belonging to them or copy what they were doing.

6 (6) Why can't Trilogy name a single one of  
7 those lost 93 customers?

8 Now, again, you're going to answer some  
9 questions on the verdict form. Let me suggest to you  
10 these questions are pretty important as well. And  
11 maybe, maybe counsel for Trilogy will answer them when  
12 he gets up here to speak to you as we're concluding.

13 Thank you very much for your time. I  
14 can't tell you how much I appreciate it. The reasonable  
15 royalty in this case is \$2 million. It's not 170  
16 million, like Trilogy suggested. It's certainly not  
17 lost profits of \$285 million.

18 Because remember what Mr. Weinstein told  
19 you. A patent is not a license to succeed. It's not.  
20 And God bless them, they tried hard; they succeeded in  
21 some things; but they didn't succeed in selling Pricer.  
22 And it didn't have anything to do with SAP.

23 Thank you for your time.

24 THE COURT: Thank you, Mr. Melsheimer.

25 Mr. Baxter, you've got 14 minutes

1 remaining for rebuttal.

2 MR. BAXTER: Thank you, Your Honor.

3 Did you say 14, Judge?

4 THE COURT: Yes, sir.

5 MR. BAXTER: May it please the Court.

6 May I have the first slide, Mr. Diaz?

7 You know, when we started out in this  
8 case, I heard this a lot from Mr. Melsheimer: Fair  
9 competition. I hate it, I just hate it when the defense  
10 is: We just competed with you fairly. So I want to  
11 talk about that before I get down to the real issues.

12 The next slide.

13 Here's what they did. They used our  
14 intellectual property. They can't even deny it now.  
15 They infringed our patent, and they used it and put it  
16 in their product. And I say that's not fair.

17 What else did they do? They refused us  
18 access to the SAP product.

19 We said: Look, guys, we've got a really  
20 good product. They looked at it, and they said: You  
21 know what? It's really good. By the way, you can't use  
22 it on our product because we're going to use it  
23 ourselves. That's not fair.

24 What else did they do? They told  
25 customers: Don't buy Trilogy. They told them: Look,

1 don't do it. We're going to come out with something one  
2 of these days. By the way, we're going to have to use  
3 their stuff, but it will be okay. It will be good.

4 What else did they do? They froze the  
5 market.

6 They said: In 1997, we're going to come  
7 out with a product. As late as April 1998, they didn't  
8 have it. They couldn't do it. They showed it to  
9 Bridgestone, and it didn't work. Bridgestone said:  
10 We're not buying that. We're going with Trilogy. But  
11 they wanted people not to buy the Trilogy product.

12 What else did they do? They said: Oh-ho,  
13 if you work with Trilogy, we're not going to work with  
14 you.

15 All of that is unfair competition, but  
16 that's exactly what they did, because they couldn't  
17 compete. And at the end of the day, they had to have  
18 our technology in order to sell a product.

19 Now, what I really want to talk to you  
20 about, however -- and you saw all those documents that  
21 we showed you, but what I really want to talk about are  
22 the Panduit factors, because that's really what the  
23 Judge is going to ask you about. And it's important to  
24 focus on those.

25 And here's the very first one: Demand for

1 the patented product.

2 Mr. Diaz, can I have the first slide on  
3 that?

4 Here is the issue. Did somebody want  
5 pricing? Well, who in the world comes into court and  
6 tells you that they really did it? It's SAP.

7 Because we got one of their documents from  
8 2008, and here's what they said. They formed up a new  
9 committee to change their pricing product, our product,  
10 to see if it won't really get even better. We'll add  
11 some more features to it.

12 And what did they do? They tell the  
13 committee: Here's what we've got. We have very high  
14 and must-have features in this that people want and have  
15 to have if they're going to do pricing.

16 Can we go to the back, Mr. Diaz?

17 Here's what it says: Very high. More  
18 than 75 percent of our customers need this  
19 functionality, 75 percent.

20 Then they say: Must have. The  
21 functionality is absolute. Customers won't buy it  
22 without it.

23 Now, here's where we come to the crux of  
24 the matter. If in 2003, when the patent comes out, they  
25 had just stopped using it and not continued on to use

1 it, or even after 2007, when we filed the lawsuit, if  
2 they had stopped then, that would be one thing. But  
3 they didn't. They just kept right on going. They just  
4 kept right on using it. And you know why? Because  
5 they've got to have the pricing product in their suite  
6 that they sell to customers.

7 Thank goodness for John Tully. What did  
8 John Tully come into court and tell you about today? He  
9 said -- go to the next one, if you would, Mr. Diaz.

10 I asked him today -- you heard him -- I  
11 said: Is pricing important?

12 He didn't just say yes. He said very.

13 I said: By the way, I want you to, right  
14 upfront, tell your customers, I don't have pricing. I  
15 can't do that for you. Sorry.

16 And he says: Oh, are you saying we  
17 wouldn't have it? If we tell a customer we didn't have  
18 pricing ability in our software?

19 And I said yes.

20 And he said: That would be a very bad  
21 day.

22 And the reason is, they've got to offer  
23 pricing to their customers. We found that back in '95,  
24 '96, '97, and '98 when we looked at all their documents.  
25 What did they tell us? They told us they had to have

1 it. They're going to go get it. They looked at the  
2 Trilogy product, and the head engineer said: It is very  
3 easy to use, and that's why we can't compete in the  
4 marketplace.

5                   You can send for those documents from  
6 Judge Everingham. He'll send them in there, and you can  
7 look at them. And I urge you to do it.

8                   But that's why the answer to Question No.  
9 1 on demand, under the Panduit factors that Judge  
10 Everingham is going to talk to you about, the answer is,  
11 absolutely, there was a demand for the product.

12                   What about the absence of non-infringing  
13 products? Can you remember what we did about that?

14                   Mr. Diaz, go to the first one.

15                   Dr. Becker got on the stand, and  
16 Dr. Becker was their man that was going to say: Oh,  
17 I've looked at all this, and it's all non-infringing  
18 products that are out there competing.

19                   And that lasted until we started asking  
20 him specific questions about the various products. I  
21 just took one of them, PeopleSoft.

22                   He said: That was a competing product.

23                   PeopleSoft doesn't exist anymore.

24                   He says no.

25                   Bought by Oracle?

1 Yes.

2 And it was just an HR system, wasn't it?

3 Yes.

4 And it didn't have a pricing system in it,  
5 did it?

6 And he said: I honestly don't know.

7 But up until that time, he was telling you  
8 that PeopleSoft was a great competitor and that people  
9 could go out and buy PeopleSoft and have pricing, and it  
10 turns out that was totally untrue.

11 And they swore for them, and they vouched  
12 for them, and he swore on it until he got caught. And  
13 then he had to admit it wasn't true.

14 And then we went through ten of those  
15 competitors, and each one of them, he had to give it up  
16 that he knew they didn't compete. Most of them didn't  
17 exist. A few of them had been bought by Oracle.

18 And Oracle's not going to be somebody you  
19 can consider to be a competitor in this, because you've  
20 got to buy their whole Backbone. You can't buy a  
21 bolt-on. There wasn't one single one of them left. And  
22 that came from the mouth of their expert.

23 But you didn't have to really go that far.  
24 Mr. Carter came in, who is very familiar with the  
25 market, and he said: Some of these are auction sites.

1 Some of them doing pricing optimization, but they don't  
2 really do pricing. There simply wasn't any competition.

3 I mean, SAP could have gone out in the  
4 marketplace and bought somebody, I suppose, if they had  
5 wanted it, but there wasn't anybody there. There simply  
6 were no non-infringing alternatives. And you heard it  
7 from both Mr. Carter, Mr. Gupta, but most importantly,  
8 you heard it from Dr. Becker, that he simply couldn't  
9 name one. He couldn't name any.

10 No. 3 is manufacturing and market  
11 capacity. That one was pretty easy. Even Mr. Wagner  
12 today said: You know what? They could crank that up  
13 anytime in 2003. No problem.

14 And it's not that we abandoned the market.  
15 We were still in the market. We were out there  
16 servicing all of our clients that we had from 1998 and  
17 1999 and 1997. We still had a team that was still  
18 working on the software, and we could have put it out,  
19 and they've not really contested that.

20 The amount of profit. Well, what did we  
21 say about that? They said and they had their experts  
22 say: If you look at the profit of Trilogy overall for  
23 one particular year, you can only find 6 percent.

24 And I asked him: Is the Judge going to  
25 ask the jury about the profit of the company or the



1 profit of the product?

2                   And he said: It's the profit of the  
3 product. And he did not have one word to say about  
4 that. He didn't offer an expert opinion on it. He  
5 didn't do any research on it.

6                   He tried to have a chart that eventually  
7 he was embarrassed to even show you. I had to drag it  
8 out and put it up there on the stand where he had used  
9 some spreadsheet that was totally fallacious to figure  
10 up some profit number for one year for one-third of  
11 their business, and he finally had to admit it was all  
12 wrong and he couldn't use it.

13                   No opinion from anybody that SAP put on  
14 the stand about the profit of this particular product.  
15 But you do have Mr. Weinstein.

16                   Mr. Diaz, can you put that slide up for  
17 me?

18                   It said: Look, here's what we're going to  
19 do. We're going to look at their top 10 people. Not in  
20 the whole company, but the top 10 people that had Pricer  
21 as the lead product. And we're going to look at it over  
22 the entire span of the products starting in '96 but also  
23 including 93.

24                   And what do we find? That that product,  
25 when you look at the license, when you look at the

1 revenue that it generated for maintenance, and you look  
2 at service, you look at all three, \$778 million.

3 Now, folks that's a lot of money, but it  
4 tells you how important the product was to these top 10  
5 companies.

6 And as Mr. Weinstein said, he segmented  
7 the market so that we're only looking at the very  
8 largest companies, and those are the companies -- and  
9 actually, we only looked at 1200 of them. We looked at  
10 the ones that SAP is in there doing business and selling  
11 their Pricer product to. The rest of the market we gave  
12 back to them. We haven't been try to get damages for  
13 that.

14 THE COURT: You've got five minutes  
15 remaining.

16 MR. BAXTER: Thank you, Your Honor.

17 Now, a profit of -- put that back up just  
18 a second, Mr. Diaz -- of 72 percent. All we're asking  
19 for in this case is not those kinds of numbers. We're  
20 only asking for a million eight for the 93 that we would  
21 have sold had they not given it away for free.

22 And remember, at one time they were going  
23 to charge for it, and then, apparently, they had a board  
24 meeting, and they said: You know, we just gave it away  
25 for free. That little gnat of Trilogy, we can just swat

1 away. And that's exactly what they did, and that's why  
2 we deserve that particular money.

3 I'm going to look at the charge for you --  
4 with you just a moment, if we can, Mr. Diaz.

5 And the very first question has to do with  
6 infringement. And this really has to do, not with  
7 whether or not they infringe the '350 patent. That's  
8 already been established. That was established in 2009.  
9 It's about the patch.

10 And can you go to the slide that shows the  
11 patch, Mr. Diaz?

12 And I noticed that Mr. Melsheimer didn't  
13 really want to talk to you about the patch very much,  
14 but here's what happened, and here's how it works.

15 If you were to look at this being the  
16 product, they wanted to fence it off, okay, but here's  
17 what they did.

18 Go to the next slide.

19 The first thing they did is they said:  
20 Well, we're going to exempt -- just on their own, they  
21 said: We're going to exempt all our prior customers  
22 prior to May of 2010. And that's about 99 percent of  
23 them.

24 So 99 percent of you get a free pass, and  
25 they're already inside tromping on the intellectual

1 property that they infringe.

2           Then they said: Well, wait a minute.  
3 There may be a hundred that are new customers, and so  
4 what we're going to do is, we're going to tell the jury  
5 that we stopped giving it to them.

6           But the way it works is, they can go out  
7 and buy a tool just off the shelf at any software store  
8 that would allow them to open the gate and get in there  
9 and use it, too, something that they already have.

10           You remember the document you saw today  
11 where they were going to disable the SAP tool, and they  
12 had so many complaints, they had to go back and undo  
13 that?

14           That might have been a work-around, but  
15 they gave it up and went to something different that  
16 didn't work so that these customers -- because all  
17 they've got to do is get that A -- the letter A in the  
18 chart, and it works like a charm, and this tool will  
19 allow you to do it.

20           But there's something else, and that is  
21 there's a third way.

22           THE COURT: You've got two minutes.

23           MR. BAXTER: Thank you.

24           And that is, there are other gates to go  
25 through, because there are other hierarchies that you

1 can use to get in the gate. And that's why -- if you go  
2 back to the chart, Mr. Diaz -- the answer to No. 1 is  
3 yes, yes, yes.

4                   These are the three claims. These are the  
5 three claims they've already been found to infringe in  
6 2009, and they still infringe them with the patch.

7                   Question No. 2 has to do with inducement.  
8 By the way, to have a claim of inducement, you have to  
9 have intent, and it's already been determined in the  
10 previous determination that the answer was yes, and they  
11 intended to do it. So you put down yes, too.

12                   No. 3 has to do with what's known as  
13 contributory infringement. Same issue. The same thing  
14 that was found in 2009, and the answer is yes.

15                   Go to the next question.

16                   You know what? It's a lot of money, but  
17 the truth is, they took our intellectual property, and  
18 they put us out of business doing that, and that's a  
19 small fraction of what we could have made.

20                   The next one has to do with the reasonable  
21 royalty. That's not something we asked for. It's  
22 something they brought up. But once they did, when you  
23 run the numbers, it turns out to be \$170 million just  
24 using what Mr. Wagner said was appropriate.

25                   If you look at a company that sold the

1 software at \$140,000 a pop and look at the math, and  
2 it's \$170,000, and I urge you to do that.

3 Go to the poll for me, would you,  
4 Mr. Diaz.

5 Now, this is something I don't think I've  
6 ever seen before in a patent case, and that is -- and I  
7 understand why they did it, because Mr. Melsheimer said  
8 they were afraid that when they came in here, they were  
9 already behind because they were found to be infringers.  
10 And that's worried them right from the first, just like  
11 he said.

12 So here's what they did. They decided to  
13 have a defense by smearing people. Mr. Gupta,  
14 Mr. Carter, it didn't make any difference who took the  
15 stand. They had something bad they were going to say.

16 You went on a vacation with Mr. Liemandt;  
17 therefore, you must be a perjurer. I've never seen  
18 such. He sent you to Harvard. Gosh, you must be lying.

19 THE COURT: Mr. Baxter, pardon me for  
20 interrupting you.

21 MR. BAXTER: Yes.

22 THE COURT: Your time has expired.

23 MR. BAXTER: Ladies and Gentlemen, I want  
24 you to take that into consideration when you write your  
25 answers down to these questions. We thank you very much

1 for your time and your consideration.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Baxter.

4 Ladies and Gentlemen of the Jury, you have  
5 heard the evidence presented by the parties to this suit  
6 and the argument of the respective attorneys in support  
7 of their positions. It is now my duty to give you the  
8 charge in this case.

9 It will be an oral charge and is given in  
10 an effort to assist you in your deliberations in  
11 deciding the issues which you must decide in order to  
12 reach a fair and impartial verdict in this case.  
13 Perhaps this function of the Court is the most important  
14 one the Court performs in the trial of a case, so I ask  
15 you to pay close attention to my remarks.

16 You will remember that at the beginning of  
17 this trial, I gave you some general instructions and  
18 definitions. Rather than repeat them, I ask you to  
19 recall them now in deciding the facts and issues which  
20 you are to decide.

21 As I instructed you at the beginning of  
22 the trial, you are the exclusive judges of the facts,  
23 the credibility of the evidence, and the weight to be  
24 given the testimony of the witnesses.

25 You are to perform your duty without bias

1 or prejudice to any party. The law does not permit  
2 jurors to be governed by sympathy or prejudice.

3 A corporation and all other persons are  
4 equal before the law and must be treated as equals in a  
5 court of justice.

6 The Court and the parties expect that you  
7 will carefully and impartially consider all of the  
8 evidence, follow the law as I will give it to you, and  
9 reach a just verdict.

10 You are instructed that all persons,  
11 including the Plaintiff and the Defendant in this case,  
12 stand equal before the law and are to be dealt with as  
13 equals in this court. The law is no respecter of  
14 persons.

15 Now, I will now briefly review the  
16 contentions of the parties and give you some additional  
17 instructions and definitions that will guide you in  
18 deciding the issues or facts that you must resolve in  
19 this case.

20 The Plaintiff, Versata, also referred to  
21 as Trilogy, seeks damages from the Defendant, SAP, for  
22 infringement of Claims 26, 28, and 29 of the United  
23 States Patent No. 6,553,350 B2, which has been referred  
24 to as the '3-5-0 patent or the '350 patent.

25 It was previously determined that SAP



1 directly infringed Claims 26, 28, and 29 of the '350  
2 patent and indirectly infringed Claim 29 of the '350  
3 patent between April 22, 2003, and May 5th, 2010, by  
4 making, selling, offering for sale, using, or importing  
5 into the United States its R/3 4.6B; R/3 4.6C; R/3  
6 Enterprise 47x110; R/3 Enterprise 47x200; mySAP ERP  
7 2004; ERP 6.0 (also known as mySAP ERP 2005); CRM 2.0C;  
8 CRM 3.0 (IPC 3.0); CRM 3.1 (or IPC 3.0); CRM 4.0 (IPC  
9 4.0); CRM 5.0; CRM 6.0 (also known as CRM 2007 and CRM  
10 7.0). Versata seeks damages in the form of lost profits  
11 to compensate it for SAP's infringement.

12                   On May 6th, 2010, SAP modified its  
13 infringing products. These will be referred to as the  
14 modified products.

15                   Versata alleges that SAP continues to  
16 directly infringe Claims 26, 28, 29 of the '350 patent  
17 and indirectly infringes Claim 29 of the '350 patent by  
18 making, selling, offering for sale, or using the  
19 modified products in or importing the modified products  
20 into the United States.

21                   Versata seeks additional damages for SAP's  
22 direct infringement of Claims 26, 28, and 29 and SAP's  
23 indirect infringement of Claim 29 of the '350 patent  
24 since May the 6th, 2010.

25                   Now, SAP denies Versata's claims. SAP

1 denies that its modified products continue to directly  
2 infringe Claims 26, 28, and 29 of the '350 patent. SAP  
3 denies that its modified products continue to indirectly  
4 infringe Claim 29 of the '350 patent.

5 SAP also contends that Versata failed to  
6 properly mark its products. SAP also contests the  
7 amount of damages that Versata is entitled to. SAP also  
8 contends that Versata is not entitled to damages in the  
9 form of lost profits and instead contends that Versata  
10 is entitled to a reasonable royalty for the alleged  
11 infringement.

12 Now, Versata bears the burden of proof by  
13 a preponderance of the evidence that SAP's modified  
14 products directly infringe the asserted claims of the  
15 '350 patent.

16 Versata also bears the burden of proof by  
17 a preponderance of the evidence that it gave notice to  
18 the public that its claimed inventions were patented by  
19 marking (in other words, placing on the product the word  
20 patent or the abbreviation P-A-T with a number of the  
21 patents) substantially all of the products Versata and  
22 its licensees sold that included or used the patented  
23 invention.

24 Versata also has the burden of proving by  
25 a preponderance of the evidence the amount of lost

1 profits damages, if any caused by SAP's infringement.

2 I will now give you some instructions and  
3 definitions to help you in answering the questions to  
4 follow.

5 With respect to claim interpretation,  
6 Versata contends that SAP's modified products infringe  
7 the '350 patent. To decide the questions of  
8 infringement, you must first understand what the claims  
9 of the patent cover, that is, what they prevent anyone  
10 else from doing. This is called claim interpretation.

11 It's my duty under the law to interpret  
12 what the words used in the patent claims mean. I have  
13 made my determination, and I will instruct you  
14 accordingly. You must apply the meaning I give the  
15 patent claims to your decisions on infringement.

16 I will now instruct you how those words  
17 are to be construed and understood when deciding the  
18 issues of infringement. You have been provided with  
19 written copies of the '350 patent and copies of these  
20 claim term definitions, and you may use them during your  
21 deliberations.

22 Now, the term "according to said  
23 hierarchy" means according to respective hierarchical  
24 levels.

25 The terms "applying" and "applied" mean

1 determine how to use and use in the manner determined.

2           The term "computer instructions to  
3 implement" means computer instructions causing a  
4 computer to implement.

5           The term "computer readable program code  
6 configured to cause a computer" means program  
7 instructions, including software providing those  
8 instructions to cause a computer.

9           The term "denormalized number" means a  
10 number used as a price adjustment that does not have  
11 fixed units and may assume a different meaning and  
12 different units depending on the pricing operation that  
13 is being performed, the specific units to be associated  
14 with the number, and how the number will be applied or  
15 determined during run time, the time that the system  
16 uses the pricing adjustment data to determine the price  
17 of the product offered to the purchasing organization.

18           The term "each of said pricing  
19 adjustments" means each pricing adjustment mentioned in  
20 any limitation of the referenced independent claim.

21           The term "hierarchy" means a branching  
22 arrangement of at least two levels of data.

23           The term "organizational group or groups"  
24 means groups of purchasing organizations where each  
25 group has a characteristic.

1           The term "plurality" means at least two.

2           The term "pricing adjustment" or "pricing  
3 adjustments" means a denormalized number that may affect  
4 the determined price.

5           The term "pricing information" means any  
6 information relating to price, other than an adjustment  
7 to price, that is not a denormalized number.

8           The term "pricing type" means a class or  
9 category of pricing adjustments.

10          The term "products" means any goods or  
11 services offered in commerce.

12          The term "product group or groups" means  
13 one or more products or services grouped together.

14          The term "purchasing organization" means  
15 any organization that purchases goods or services  
16 offered in commerce.

17          The term "receiving the price of the  
18 product determined using pricing information applicable  
19 to the one or more identified organizational groups and  
20 the one or more identified product groups according to  
21 the hierarchy of product groups and the hierarchy of  
22 organizational groups" means receiving the product's  
23 price which was determined by taking into account the  
24 respective levels of applicable pricing information in  
25 the product hierarchy and respected levels of applicable

1 pricing information in the organizational hierarchy.

2           The term "sorting the pricing information"  
3 means the pricing information is ordered.

4           The term "storing" means recorded in any  
5 manner.

6           And the term "the pricing information that  
7 is less than restrictive" means pricing information that  
8 is less specifically applicable to a product, a  
9 purchasing organization, an organizational group, or a  
10 product group.

11           Now, with respect to determining  
12 infringement, once the patent is issued, the owner of a  
13 patent has the right to exclude others from making,  
14 using, offering to sell, or selling the patented  
15 invention throughout the United States or importing the  
16 patented invention into the United States for a term of  
17 20 years.

18           Thus, infringement occurs when a person,  
19 without the owner's permission, makes, uses, offers to  
20 sell, or sells the patented invention anywhere in the  
21 United States or imports the patented invention into the  
22 United States while the patent is in force.

23           To determine whether there's an  
24 infringement, you must compare the allegedly infringing  
25 modified products with the scope of the patent claims as

1 I have defined them for you. You should not compare the  
2 Plaintiffs' commercial embodiment of its invention to  
3 the allegedly infringing modified product to determine  
4 whether there is an infringement.

5 In order to infringe a patent claim, a  
6 product or a method must include each and every  
7 limitation of the claim. In determining whether SAP's  
8 modified products infringe Versata's asserted claims,  
9 you must determine for each accused product or its  
10 method of use whether that product or its method of use  
11 contains each and every limitation recited in a claim.

12 A claim limitation is present if it exists  
13 in the accused product or its method of use just as it  
14 is described in the claim language, either as I have  
15 explained that language to you, or if I did not explain  
16 it, as it would be understood by a person of skill in  
17 the art.

18 If such products or their methods of use  
19 omit even a single limitation, then you must find that  
20 the claim is not infringed. You must consider each of  
21 the patent claims separately.

22 If you find that each and every limitation  
23 of a patent claim is found in the accused products or  
24 their methods of use, then the claim is infringed, even  
25 if the accused products or their methods of use may be

1 more or less efficient or may include additional  
2 features or functions not found in the claims.

3           Whether or not SAP knew that what it was  
4 doing was an infringement does not matter for direct  
5 infringement. A person may be found to be a direct  
6 infringer of a patent even if he or she believed in good  
7 faith that what he or she was doing was not an  
8 infringement of any patent and even if he or she did not  
9 know of the existence of the patent.

10           Now, the asserted claims use the word  
11 "comprising." When a claim uses the word "comprising,"  
12 comprising means including or containing.

13           A claim that uses the word "comprising" or  
14 "comprises" is not limited to products having only the  
15 elements that are recited in the claim but also covers  
16 products that add additional elements.

17           Let's take as an example a claim that  
18 covers a table. If the claim recites a table comprising  
19 a tabletop, legs, and glue, the claim will cover any  
20 table that contains these structures even if the table  
21 also contains other structures, such as a leaf or wheels  
22 on the legs.

23           Let's talk about dependent claims. My  
24 instructions on infringement so far have related to  
25 independent claims. Patent claims may exist in two



1 forms referred to as independent claims and dependent  
2 claims.

3           An independent claim does not refer to any  
4 other claim in the patent. Thus, it is not necessary to  
5 look at any other claim to determine what an independent  
6 claim covers. Claim 29 in the '350 patent is an  
7 independent claim.

8           A dependent claim refers to at least one  
9 other claim in the patent. A dependent claim includes  
10 each of the elements of the other claim to which it  
11 refers, plus additional elements recited in the  
12 dependent claim itself.

13           Claim 26 in the '350 patent is a dependent  
14 claim that depends on Claim 17 of the '350 patent. In  
15 order for you to find that Claim 26 of the '350 patent  
16 is infringed, you must first find that Claim 17 is  
17 infringed.

18           If you find that independent Claim 17 of  
19 the '350 patent is not infringed, you must find that  
20 dependent Claim 26 is also not infringed.

21           Claim 28 in the '350 patent is a dependent  
22 claim that depends on Claim 27 of the '350 patent. In  
23 order for you to find that Claim 28 of the '350 patent  
24 is infringed, you must first find that Claim 27 is  
25 infringed.

1           If you find that independent Claim 27 of  
2 the '350 patent is not infringed, then you must also  
3 find that dependent Claim 28 is not infringed.

4           Now, with respect to induced infringement,  
5 in addition to enforcing a patent against a direct  
6 infringer, a patent owner may also enforce the patent  
7 against indirect infringers.

8           There are two types of indirect  
9 infringement: Inducing infringement and contributory  
10 infringement.

11           The act of encouraging or inducing others  
12 to infringe a patent is called inducing infringement.

13           The act of contributing to the  
14 infringement of others by, for example, supplying them  
15 with components used in the patented invention, is  
16 called contributory infringement.

17           Now, Versata asserts that SAP has induced  
18 infringement of Claim 29 of the '350 patent. To show  
19 inducement, Versata must prove by a preponderance of the  
20 evidence that a third party has directly infringed the  
21 patent.

22           If there's no direct infringement by a  
23 third party, SAP has not induced infringement. If you  
24 find that a third party has directly infringed Claim 29  
25 of the '350 patent, it is not necessary to show that SAP

1   itself has directly infringed if Versata proves by a  
2   preponderance of the evidence that SAP actively and  
3   knowingly aided and abetted that direct infringement.

4               Furthermore, Versata must show that SAP  
5   actually intended to cause the acts that constitute  
6   direct infringement and that SAP knew or should have  
7   known that its actions would induce actual infringement.

8               Inducing third-party infringement cannot  
9   occur unintentionally. This is different from direct  
10  infringement, which can occur unintentionally.

11              If you find that a third party has  
12  directly infringed Claim 29 of the '350 patent and that  
13  SAP knew -- SAP knew or should have known that its  
14  actions would induce direct infringement, you may find  
15  that SAP induced another to infringe Versata's patent if  
16  SAP provided instructions and directions to perform the  
17  infringing act through labels, advertisements, or other  
18  sales methods.

19              You may also find that SAP induced  
20  infringement by supplying the components that are used  
21  in an infringing apparatus with the knowledge and intent  
22  that its customer would directly infringe by using the  
23  components to make, use, or sell the patented invention.

24              With respect to contributory infringement,  
25  Versata asserts that SAP is liable for contributing to

1 the infringement of Claim 29 of the '350 patent.

2           Versata has the burden to prove  
3 contributory infringement by a preponderance of the  
4 evidence.

5           To establish contributory infringement by  
6 SAP, Versata must first show that a third party directly  
7 infringed one of the asserted claims of the patent;  
8 however, Versata does not need to prove that SAP itself  
9 directly infringed.

10           If there is no direct infringement by a  
11 third party, there can be no contributory infringement.

12           Now, if you find a third party has  
13 directly infringed the patent, then contributory  
14 infringement exists if Versata proves that:

15                   (1) SAP sold or offered for sale in the  
16 United States;

17                   (2) a material component of the patented  
18 invention that is not a staple article of commerce  
19 capable of substantial non-infringing use;

20                   (3) with knowledge that the component was  
21 especially made or adapted for use in an infringing  
22 product.

23           A staple article of commerce capable of  
24 substantial non-infringing use is something that has  
25 uses other than as a part or component of the patented

1 product or other than in the patented method and those  
2 uses -- excuse me -- and that those uses are not  
3 occasional, farfetched, impractical, experimental, or  
4 hypothetical.

5               Now, I will now instruct you as to the  
6 calculation of damages.

7               As I have mentioned, it has been  
8 previously determined that SAP directly and indirectly  
9 infringed certain claims of the '350 patent between  
10 April 22nd, 2003, and May 5th, 2010.

11              Your job as the jury in this case will be  
12 to determine the amount of money that Versata should  
13 receive as damages for that period. If you determine  
14 that SAP's modified products have continued to infringe  
15 any of the claims -- any of the asserted claims of the  
16 '350 patent since May 6th, 2010, then you should also  
17 award Versata damages for the period from May 6th, 2010,  
18 until today.

19              Versata has the burden of proving by a  
20 preponderance of the evidence the amount of damages  
21 caused by SAP's conduct. Even though I am instructing  
22 you on how you should measure damages and even though I  
23 am instructing you that SAP's products infringed the  
24 patent prior to May 6th, 2010, this should not be taken  
25 to mean that I believe that SAP's modified products have

1 infringed the patent.

2           This is an issue for you to resolve under  
3 the instructions I have given you. I am instructing you  
4 on damages only so that you will have guidance to  
5 determine damages for infringement that has previously  
6 been determined and so that you will have guidance  
7 should you decide that SAP's modified products have  
8 infringed the patent.

9           Versata is asking for damages in the  
10 amount of lost profits. To be entitled to lost profits,  
11 Versata must first prove that but for any infringement,  
12 it would have made additional sales and profits on those  
13 sales. You may hear this referred to as the but-for  
14 test. I will discuss lost profits in more detail  
15 shortly.

16           Now, should you determine that Versata has  
17 failed to prove with reasonable certainty its claim for  
18 lost profits, you should award Versata a reasonable  
19 royalty to compensate it in lieu of such profits.

20           You should also award a reasonable royalty  
21 to Versata to compensate it for infringing sales of  
22 SAP's products that were not included in Versata's lost  
23 profits claim.

24           A reasonable royalty, which I will discuss  
25 later in more detail, is defined by the patent law as

1 the reasonable amount that someone wanting to use the  
2 patented invention should expect to pay to the patent  
3 owner and the owner should expect to receive.

4 A patent owner may recover no less than a  
5 reasonable royalty. The amount of damages must be  
6 adequate to compensate Versata for the infringement, but  
7 in no event less than a reasonable royalty.

8 I will first instruct you about lost  
9 profits damages. Simply stated, lost profits damages  
10 are the profits that Versata lost because of the  
11 infringement. They are not the profits SAP made.

12 Versata has the burden to show that it was  
13 more probable than not that it would have made  
14 additional profits if SAP had not infringed.

15 Versata may receive damages for lost  
16 profits only on those products that compete with SAP's  
17 products that infringe. Versata may not receive lost  
18 profits damages for other products or services that  
19 might be sold along with a competing product for  
20 convenience or business advantage but that are not  
21 functionally part of the competing product.

22 In deciding whether Versata lost sales,  
23 you should consider whether or not Versata has proved  
24 that it had the manufacturing capacity and the marketing  
25 capability to make the sales it says it lost.

1                   Versata must prove that it was more  
2                   probable than not that it could have made or could have  
3                   had someone else make for it the additional products it  
4                   says it could have sold but for the infringement.  
5                   Versata also must prove that it had the capability to  
6                   market and sell the additional products.

7                   You must also consider whether or not, if  
8                   SAP's infringing products were not available, some or  
9                   all of the people who bought from SAP would have bought  
10                  a different non-infringing product from SAP or from  
11                  somebody else rather than buy from Versata.

12                  In deciding whether or not people who  
13                  bought from SAP would have bought a non-infringing  
14                  product, you should consider whether or not there was  
15                  such a demand for the patented aspects of the infringing  
16                  product that purchasers would not have bought a  
17                  non-infringing product.

18                  If you find infringement, you may consider  
19                  demand for the infringing features of the accused  
20                  products to be demand for the patented invention.

21                  It is not necessary for Versata to prove  
22                  that it and SAP were the only two suppliers in the  
23                  market in order for -- for Versata to demonstrate  
24                  entitlement to lost profits.

25                  If the realities of the marketplace are



1 such that acceptable non-infringing substitutes were  
2 available from suppliers who would have made some but  
3 not all of the sales that were made by SAP, then Versata  
4 may be entitled to lost profits on a portion of the  
5 infringing sales.

6           The burden is on Versata, however, to show  
7 a reasonable probability that it would have sold that  
8 portion if SAP's product had never existed.

9           If Versata has proved that it lost profits  
10 due to the infringement by SAP, then you are to find the  
11 amount of profits that it lost. Versata must prove the  
12 amount of its lost profits to a reasonable probability.  
13 The amount of lost profits damages should not include  
14 amounts that are merely speculation.

15           You have heard evidence that SAP modified  
16 its products in May 2010 and that it did not require  
17 prior users to implement the modified product. Your  
18 damages award will compensate Versata for damage  
19 resulting from that infringement and will license SAP to  
20 use the '350 patent for those users.

21           You should not infer that SAP was required  
22 to disable the infringing functionality because of the  
23 prior determination of infringement. I have allowed you  
24 to consider this evidence because it may be relevant to  
25 the question of demand for the patented technology.

1           I will now instruct you about reasonable  
2 royalty damages.

3           Generally, a reasonable royalty is defined  
4 by the patent laws as the reasonable amount that someone  
5 wanting to use the patented invention should expect to  
6 pay the patent owner and the owner should expect to  
7 receive.

8           A royalty is the amount of money a  
9 licensee pays to a patent owner for each article the  
10 licensee makes or uses or sells or offers to sell under  
11 the patent or for the right to use the claimed method.

12           A reasonable royalty is the amount of  
13 money a willing patent owner and a willing prospective  
14 licensee would have agreed upon at the time of the  
15 infringement for a license to make, use, sell, or offer  
16 to sell the invention.

17           In making your determination of the amount  
18 of a reasonable royalty, it is important that you focus  
19 on the time period when the infringer first infringed  
20 the patent and the facts that existed at that time.

21           Your determination does not depend on the  
22 actual willingness of the parties to this lawsuit to  
23 engage in such negotiations. Your focus should be on  
24 what the parties' expectations would have been had they  
25 entered negotiations for royalties at the time of the

1    infringing activity. The infringer's actual profits may  
2    or may not bear on the reasonableness of an award based  
3    on a reasonable royalty.

4                    In determining the reasonable royalty, you  
5    should consider all the facts known and available to the  
6    parties at the time the infringement began. Some of the  
7    kinds of factors that you may consider in making your  
8    determination are;

9                    (1) whether the patent-holder had an  
10   established royalty for the invention; in the absence of  
11   such a licensing history, any royalty arrangements that  
12   were generally used and recognized in the particular  
13   industry at that time;

14                   (2) the nature of the commercial  
15   relationship between the patent owner and the licensee,  
16   such as whether they were competitors or whether their  
17   relationship was that of an inventor and a promoter;

18                   (3) the established profitability of the  
19   patented product, its commercial success, and its  
20   popularity at the time;

21                   (4) whether the patent owner had an  
22   established policy of granting licenses or retaining the  
23   patented invention as its exclusive right or whether the  
24   patent-holder had a policy of granting licenses under  
25   special conditions designed to preserve his monopoly;

1                   (5) the size of the anticipated market for  
2 the invention at the time the infringement began;

3                   (6) the duration of the patent and of the  
4 license, as well as the terms and scope of the license,  
5 such as whether it is exclusive or nonexclusive or  
6 subject to territorial restrictions;

7                   (7) the rates paid by the licensee for the  
8 use of other patents comparable to the Plaintiffs'  
9 patent;

10                  (8) whether the licensee's sales of the  
11 patented invention promote sales of its other products  
12 and whether the invention generates sales to the  
13 inventor of his non-patented items;

14                  (9) the utility and advantages of the  
15 patent property over the old modes or devices, if any,  
16 that had been use for working out similar results;

17                  (10) the extent to which the infringer  
18 used the invention and any evidence probative of the  
19 value of such use;

20                  (11) the portion of the profits in the  
21 particular business that are customarily attributable to  
22 the use of the invention or analogous inventions;

23                  (12) the portion of the profits that  
24 should be credited to the invention as distinguished  
25 from non-patented elements, the manufacturing process,

1 business risks, or significant features or improvements  
2 added by the infringer;

3 (13) the opinion and testimony of  
4 qualified experts and of the patent-holder;

5 And finally (14) any other factors which  
6 in your mind would have increased or decreased the  
7 royalty the infringer would have been willing to pay and  
8 the patent owner would have been willing to accept  
9 acting as normally prudent business people.

10 You must not award the Plaintiff more  
11 damages than are adequate to compensate for the  
12 infringement nor shall you include any additional amount  
13 for the purpose of punishing the Defendant or setting an  
14 example.

15 You should not include damages that are  
16 speculative, damages that are only possible, or damages  
17 that are based on guesswork.

18 You may not award damages based on the  
19 entire value of SAP's accused products unless you first  
20 determine that it was the patented invention, as  
21 distinct from other non-infringing elements or features  
22 of the accused products, that caused the consumer demand  
23 for the accused product as a whole.

24 You may not award damages for  
25 non-infringing products or services unless you find that

1 the infringement caused the -- caused the customer to  
2 purchase those products or services.

3 In addition, the non-infringing elements  
4 or features of the accused products must function  
5 together with the infringing features of the accused  
6 products in some manner so as to produce a desired end  
7 product or result.

8 All of the components together must be  
9 analogous to components of a single assembly or be parts  
10 of a complete machine or they must constitute a  
11 functional unit.

12 If you find that SAP is liable for  
13 contributory infringement or inducement of infringement  
14 in connection with Claim 29 of the '350 patent, you  
15 should award damages for infringement of that claim only  
16 for instances of direct infringement shown by a  
17 preponderance of the evidence that occurred after  
18 April 20th, 2007, the date this suit was filed.

19 And with respect to marking, Versata may  
20 recover damages for infringement that has occurred only  
21 after Versata gave notice to SAP of its patent rights  
22 directly or by public notice.

23 It is Versata's burden to prove that it is  
24 more probable than not that it gave notice to the public  
25 that its claimed inventions were patented.

1           Versata can give notice to the public in  
2     general by placing the word "patent" or the abbreviation  
3     P-A-T with the number of the patents on substantially  
4     all of the products it sold that included or used the  
5     patented invention.

6           Versata must take reasonable efforts to  
7     ensure that its licensees who use the patented invention  
8     also mark with the patent number substantially all of  
9     their products that include the patented invention.

10          Marking notice is effective from the date  
11     Versata and its licensees began to consistently and  
12     continuously mark substantially all of their products  
13     that use the patented invention with the patent number.

14          If Versata and its licensees did not mark  
15     substantially all of their products that use the  
16     patented invention with the patent number, then Versata  
17     did not provide notice in this way.

18          If Versata does not demonstrate that it  
19     gave this type of notice, then Versata can recover  
20     damages for only those acts of infringement that  
21     occurred after it sued SAP on April 20th, 2007.

22          Now, nothing that I may have said or done  
23     during the course of this trial is intended to indicate  
24     any view of mine as to the amount of damages you should  
25     award or whether SAP's modified products still infringe.

1           As I instructed you previously, the jury  
2 is the sole judge of the credibility of the testimony  
3 and the weight to be given the evidence.

4           These instructions are given to you as a  
5 whole, and you are not to single out one instruction  
6 alone as stating the law but must consider the  
7 instructions as a whole.

8           You have heard all of the evidence in this  
9 case, and you've heard the argument of counsel. The  
10 Court has given you the charge in this case. In a few  
11 moments, you will retire to the jury room, select one of  
12 your members to act as foreperson, and begin performing  
13 the function for which you have been chosen and for  
14 which you have been impaneled in accordance with the  
15 oath you took as jurors.

16           You will remember that at the beginning of  
17 the trial and throughout the trial, the Court admonished  
18 you not to discuss the case with each other until it was  
19 submitted to you.

20           Well, now is the time for you to begin  
21 your discussion, and you certainly may express an  
22 opinion from the evidence that you have heard and use  
23 any reasonable means to persuade other members of the  
24 jury to your convictions and to your honest opinion.

25           You are to reach a verdict which speaks



1 the truth and which does justice to all parties without  
2 favor, bias, or prejudice in any particular way either  
3 for or against any party to this lawsuit.

4               In the course of your deliberations, do  
5 not hesitate to re-examine your own views and change  
6 your opinions if convinced it is erroneous, but do not  
7 surrender your honest conviction as to the weight or  
8 effect of the evidence solely because of the opinion of  
9 your fellow jurors or for the mere purpose of returning  
10 a verdict.

11              The verdict must represent the considered  
12 judgment of each juror. In order to return a verdict,  
13 it is necessary that each juror agree thereto. Your  
14 verdict must be unanimous.

15              As soon as you have reached a verdict, you  
16 will let this fact be known to the officer who will be  
17 waiting upon you, and he will report to the Court.

18              Now, your verdict will be in the form of  
19 questions for you to answer. You're going to take these  
20 questions to the jury room, and when you have reached a  
21 unanimous agreement as to your verdict, you will have  
22 your foreperson fill in, date, and sign the form and  
23 then advise the court security officer that you've  
24 reached a verdict.

25              During your deliberations, you may have

1 any of the exhibits which have been offered into  
2 evidence, and the Court will send them to you upon  
3 written request.

4           If you desire further instructions, your  
5 foreperson may make this known in writing, and the Court  
6 will try to comply with your wishes. All communications  
7 with the Court must be in writing, but at no time should  
8 you indicate to the Court or anyone else how the jury is  
9 divided in answering any particular question.

10           Any notes that you have taken during this  
11 trial are only aids to your memory. If your memory  
12 should differ from your notes, then you should rely on  
13 your memory and not on your notes. The notes are not  
14 evidence.

15           A juror who has not taken notes should  
16 rely on his or her independent recollection of the  
17 evidence and should not be unduly influenced by the  
18 notes of other jurors. Notes are not entitled any  
19 greater weight than the recollection or impression of  
20 each juror concerning the testimony.

21           Now, that concludes the Court's  
22 instructions. Up until now, I have set the schedule,  
23 but, henceforth, you-all can set your own schedule. I  
24 mean, I'm available to work into the evening tonight, if  
25 you'd like to, or you can come back in the morning, if

1 you like. It's entirely up to you. If you wish to take  
2 a break, then y'all are in charge of setting your own  
3 breaks.

4 So I will tell you, I would just ask that  
5 you let me know sometime before 5:00 or 5:30 if you wish  
6 to work into the evening tonight, and that way I can at  
7 least make arrangements to have some staff here to --  
8 to -- to help, okay?

9 I now hand the questions to Mr. Woloson.  
10 He's going to follow you into the jury room, and you may  
11 begin your deliberations.

12 LAW CLERK: All rise for the jury.

13 (Jury out.)

14 THE COURT: All right. Any additional  
15 objections to the charge as read from the Plaintiff?

16 MR. BAXTER: No, Your Honor.

17 THE COURT: From the Defendant?

18 MR. MELSHEIMER: No, Your Honor.

19 THE COURT: All right. Court's in recess  
20 pending communication from the jury.

21 (Jury deliberations.)

22 (Court adjourned.)  
23  
24  
25

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/

May 12, 2011

SHELLY HOLMES, CSR  
Deputy Official Court Reporter  
State of Texas No. 7804  
Expiration Date: 12/31/12

/s/

May 12, 2011

GLENDIA FULLER, CSR  
Deputy Official Court Reporter  
State of Texas No. 1042  
Expiration Date: 12/31/12